

2541

No. 11983

United States
Court of Appeals
 for the Ninth Circuit

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
 PANY, a Corporation, and MORRISON-
 KNUDSEN COMPANY, INC., a Corporation,
 Appellees.

Transcript of Record

(In Two Volumes)

VOLUME I

(Pages 1 to 38)

FILED

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PAUL P. O'BRIEN,
CLERK

Appeal from the District Court of the United States
 for the Western District of Washington,
 Northern Division

No. 11983

United States
Court of Appeals
for the Ninth Circuit

VERNON O. TYLER,

Appellant,

vs.

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Appellees.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1293

VERON O. TYLER, Plaintiff,
vs.
S. BIRCH & SONS CONSTRUCTION COM-
PANY and MORRISON -KNUDSEN, INC.,
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,
vs.
S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,
vs.
S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

MOTION FOR PERMISSION TO REOPEN
CAUSES FOR FURTHER PROCEEDINGS,
TO FILE AMENDMENTS TO ANSWERS
AND AFFIRMATIVE DEFENSES OF DE-
FENDANTS, AND TO INTRODUCE TESTI-
MONY IN SUPPORT THEREOF

Comes now S. Birch & Sons Construction Com-
pany, a corporation, and Morrison-Knudsen Com-
pany, Inc., a corporation, defendants, herein, and
respectfully [1*] move the above entitled Court

* Page numbering appearing at foot of page of original
certified Transcript of Record.

for permission to reopen the above entitled Causes for further proceedings, to file therein amendments to the Answers and Affirmative Defenses of the defendants, to plead as further Affirmative Defenses to the plaintiffs' Complaints the following:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended, and that the defendants be permitted by the Court to reopen the above entitled Causes, for the purpose of [2]

permitting defendants to introduce testimony in support of said additional defenses.

This Motion is based upon the files, records and proceedings herein, and upon the accompanying Affidavit of Gerald DeGarmo.

ALLEN, HILEN, FROUDE
& DeGARMO,
By GERALD DeGARMO,
Attorneys for Defendants.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath deposes and says: That he is an Attorney at Law, a member of the law firm of Allen, Hilen, Froude & DeGarmo, and one of the attorneys for the defendants in the above entitled actions.

That the above entitled actions were heard as consolidated Causes for the purpose of trial in the above entitled Court, commencing on the 7th day of May, 1946, and as a result of said trial Findings of Fact, Conclusions of Law and Judgment were entered in each of said Causes on the 28th day of May, 1946. That thereafter, and within the time permitted by law, the defendants in said Causes appealed from said Judgments to the Circuit Court of Appeals for the Ninth Circuit, which appeal was heard upon briefs and oral argument by the Circuit Court of Appeals at San Francisco, California on the 15th day of May, 1947, and said Causes taken under advisement.

That on the 1st day of May, 1947, while said

Causes were pending in the Circuit Court of Appeals for the Ninth Circuit, there was passed by [3] the House and Senate of the United States, and thereafter signed by the President of the United States, so as to become law on the 14th day of May, 1947, H.R. 2157, otherwise designated and known as the "Portal-to-Portal Act of 1947", which said Portal-to-Portal Act of 1947 contains, among others, the following provisions:

"Sec. 9. Reliance on Past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belongs. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

* * * *

“Sec. 11. Liquidated Damages,—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.”

That following the passage of the foregoing mentioned Portal-to-Portal Act of 1947 the defendants [4] herein, and appellants before the Circuit Court of Appeals for the Ninth Circuit, filed in said Appellate Causes, with the Circuit Court of Appeals for the Ninth Circuit, motions to Remand said Causes to the above entitled Court for further proceedings, and in order to permit the defendants herein to take advantage of the provisions of the Portal-to-Portal Act of 1947, heretofore quoted, which said Motions were heard by the Circuit Court of Appeals for the Ninth Circuit on the 7th day of July, 1947 and resulted in the entry of an Order by the Circuit Court of Appeals for the Ninth Circuit on the 15th day of September, 1947, a certified copy of which is on file in each of the above mentioned Causes, and which said Order provides as follows:

“Upon motion of appellants in the above entitled cases all of the said cases are hereby remanded to the trial courts whence they came with instructions that appropriate and proper proceedings be permitted in the referred to court whereby appellants may proffer pleadings to the effect that all defenses permitted by Sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue. We herewith make no decision or intimation as to the merits of the proffer.”

And that by Supplemental Order, dated October 13, 1947, said previous Order of September 15, 1947 was modified nunc pro tunc, as follows:

“Good cause appearing the order of this court of September 15th, 1947 wherein motions of appellants in the above entitled cases were granted remanding the said cases and that appropriate and proper proceedings be permitted in the trial courts to the end that appellants may proffer pleadings to the effect that all defenses permitted by Sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue, is hereby amended nunc pro tunc so as to state Sections 9 and 11 of the said Act instead of 9 and 10 thereof.” [5]

That a certified copy of said Order of October 13, 1947 is on file in each of the above entitled Causes.

That each of Sections 9 and 11, heretofore quoted, is applicable to and constitutes a proper defense to the above entitled Causes, and that if permitted to interpose said defenses and introduce testimony in support thereof it can be shown by the defend-

ants herein that in truth and in fact the defendants herein come within the purview of said statute and the provisions heretofore quoted.

GERALD DeGARMO.

Subscribed and sworn to before me this 15th day of October, 1947.

(Seal) NORA E. GREENLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 15, 1947. [6]

[Title of District Court and Cause.]

ORDER UPON MOTION TO REOPEN CAUSE
FOR FURTHER PROCEEDINGS, TO FILE
AMENDMENT TO ANSWER AND AFFIRM-
ATIVE DEFENSES, AND TO INTRODUCE
TESTIMONY IN SUPPORT THEREOF

This Cause having come on regularly for hearing on the 20th day of October, 1947, before the undersigned, one of the Judges of the above entitled Court, upon the Motion of the defendants herein to reopen this Cause for further proceedings, to file an amendment to their Answer and Affirmative Defenses herein and to introduce testimony in support thereof; and said defendants having appeared by Gerald DeGarmo of Allen, Hilén, Froude & DeGarmo, their Counsel, and the plaintiff having appeared by George J. Toulouse, Jr., and John J.

O'Brien, of Wettrick, Flood & O'Brien and George R. Stuntz, his Counsel; and the Court having considered the Motion of the defendants and the Affidavits in support thereof, and the Affidavits submitted on behalf of the plaintiff in resistance to said Motion, and having examined the files, records and proceedings herein and deeming itself fully advised in the premises:

Now, therefore, it is hereby ordered that the Motion of the defendants herein, to reopen the above entitled Cause for further proceedings, to file an amendment to the Answer and Affirmative Defenses of the defendants herein and to introduce testimony in support thereof, be and the same is hereby granted in all particulars; conditioned, however, upon the terms that the defendants pay to the Attorneys for the plaintiff, within fifteen (15) days from October 20, 1947, the sum of \$482.55, on account of out-of-pocket expense of the plaintiff and his Counsel herein, and the sum of \$600.00, [7] on account of Attorneys' fees, said sums to apply on account of the taxable and allowable costs and the allowance for Attorneys' fees respectively herein in the event of ultimate recovery by the plaintiff herein, but not to be repayable by plaintiff or his Attorneys herein to defendants, or to be taxable as costs and disbursements by the defendants, in the event of final judgment herein in favor of defendants.

The defendants except to that portion of the foregoing Order imposing terms and conditions, and the plaintiff excepts to that portion of the fore-

going Order granting the Motion of the defendants, and the exceptions are hereby allowed.

Done in open court this 31st day of October, 1947.

JOHN C. BOWEN,
District Judge.

Presented by:

GERALD DeGARMO,
Atty. for Defts.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 31, 1947. [8]

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER AND
AFFIRMATIVE DEFENSE

Come now the defendants herein, and for Supplemental Answer and Additional Affirmative Defenses to the Complaint of the plaintiff, in accordance with leave granted by Order of this Court, dated October 31, 1947, plead and allege as follows:

V.

That all contracts of employment between the plaintiff and the assignors of plaintiff and these answering defendants, and all wages and salaries paid thereunder, were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War

Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, or to any of the assignors of plaintiff, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

Wherefore, the defendants pray that the Complaint of [9] the plaintiff herein, and all causes of action therein set forth, and any additional causes of action as subsequently pleaded by the plaintiff, may be dismissed with prejudice, and that the defendants may have and recover their costs herein.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 4, 1947. [10]

[Title of District Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947

Now comes the United States of America, by its Attorney General, and pursuant to the Act of August 24, 1937 (c. 754, sec. 1, 50 Stat. 751, 28 U.S.C. Sec. 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947, and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said Act, or any part thereof, upon the ground that it is unconstitutional.

The United States moves also for leave to file a brief in support of the constitutionality of the said

Portal-to-Portal Act of 1947, within 30 days after service [11] upon it of plaintiff's brief on the constitutional issue or such other time as the Court may deem reasonable.

TOM C. CLARK,
Attorney General,

By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney
General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947. [12]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN
INTERVENTION

The United States of America, intervenor herein for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,

Attorney General,

By /s/ HERBERT A. BERGSON,

Acting Assistant Attorney

General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

Lodged Dec. 11, 1947.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 29, 1947. [13]

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendants, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without decision

upon said appeal, to this Court by Order signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947, to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and having listened to the argument of counsel, and having heretofore orally announced its decision herein, and being fully advised in the premises; now, therefore, the Court does hereby make the following Supplemental:

FINDINGS OF FACT

I.

That all practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff, and by the plaintiff's assignors, in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations [14] of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Depart-

ment, and the War Department Wage Administration Agency.

II.

That all practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff, and by the plaintiff's assignors, in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable ground for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as Amended.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

From the foregoing Findings of Fact the Court hereby deduces the following:

CONCLUSIONS OF LAW

I.

That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

II.

That defendants are subject to no liability to the plaintiff, or to plaintiff's assignors, for or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.

III.

That Paragraph 14 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and the Judgment, heretofore entered herein on the 28th

day of May, 1946, in favor of Plaintiff and plaintiff's assignors and against defendants, should be vacated, set aside and held for naught. [15]

IV.

That the action of the plaintiff, and the plaintiff's assignors herein, should be dismissed with prejudice, and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants, to be taxed in accordance with law and the rules of this Court.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE
& DeGARMO,

By /s/ GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 2, 1948. [16]

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1293

VERNON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY and MORRISON-KNUDSEN, INC.,
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

SUPPLEMENTAL JUDGMENT

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendant, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without

decision upon said appeal, to this Court by Order, signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947, to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and having listened to the argument of counsel, and having heretofore orally announced its decision herein, and having made and entered Supplemental Findings of Fact and Conclusions of Law; and the Court being fully advised:

Now, therefore, it is hereby ordered, adjudged and decreed that Paragraph 14 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and the Judgment, heretofore [17] signed, filed and entered herein on the 28th day of May, 1946, be and the same are hereby vacated, set aside and held for naught.

It is further ordered, adjudged and decreed that the action of the plaintiff, Vernon O. Tyler, and of the plaintiff's assignors, Clifford A. Hood, R. Owen Shumate, Einnar C. Forstein, Louie Lung Kin,

Winthrop H. Raymond and Claude E. Bruner, be and the same are hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants and against the plaintiff, Vernon O. Tyler, to be taxed in the manner provided by law and by the rules of this Court.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE
& DeGARMO,

By /s/ GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 2, 1948. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Vernon O. Tyler, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that supplemental judgment entered in this action on the 2nd day of March, 1948.

WETTRICK, FLOOD &
O'BRIEN, and GEORGE R.
STUNTZ,

By /s/ GEORGE E. FLOOD,
GEORGE J. TOULOUSE, JR.,
Attorneys for Appellant.

[Endorsed]: Filed Apr. 23, 1948. [19]

[Title of District Court and Cause.]

ORDER TO EXTEND TIME TO FILE RECORD
AND DOCKET ACTION

These causes coming on for hearing on motion to extend the time within which to file a record on appeal and to docket the actions with the Circuit Court of Appeals for the Ninth Circuit, until the 20th day of July, 1948, and good cause appearing therefor, it is hereby

Ordered that the time for the filing for the record on appeal and docketing of the actions in the Circuit Court of Appeals for the Ninth Circuit by the parties hereto, be, and the same is hereby, extended to and including the 20th day of July, 1948.

Done in open court this 28th day of May, 1948.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ FREDERICK PAUL,
Attorney for Plaintiffs.

Approved:

BOGLE, BOGLE & GATES,
By J. TYLER HULL,
Attorney for Guy F. Atkinson
Co.

Approved:

ALLEN, HILEN, FROUDE
& DeGARMO,
By G. DeGARMO,
Attorney for S. Birch & Sons Constr. Co. and Mor-
rison-Knudsen Co.

[Endorsed]: Filed May 28, 1948. [20]

In the District Court of the United States for the
Western District of Washington,
Northern Division

No. 1293

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees,

UNITED STATES OF AMERICA,

Intervenor.

DESIGNATION OF PORTIONS OF RECORD
TO BE CONTAINED IN RECORD
ON APPEAL

Plaintiff and appellant hereby designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Motion for Permission to Reopen Cause for Further Proceedings.
2. Order upon Motion to Reopen Cause for Further Proceedings.
3. Supplemental Answer and Affirmative Defenses.
4. Motion of the United States to Intervene and for Time Within Which to File Brief in Support of the Constitutionality of the Portal-to-Portal Act of 1947.

5. Pleading of the United States in Intervention.
6. Transcript of Testimony.
7. All exhibits introduced at time of trial.
8. Supplemental Findings of Fact and Conclusions of Law.
9. Supplemental Judgment.
10. Notice of Appeal.
11. Order Extending Time to File Records and Docket Action on Appeal.
12. This Designation.
13. Designation by Appellee of Additional matters to be included in the [21] records, if any.
14. Cost Bond on Appeal.
15. Stipulation Concerning Exhibits on Appeal.
16. Order Concerning Exhibits on Appeal.
17. Stipulation Concerning Record on Appeal.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,
By GEORGE J. TOULOUSE, JR.,
Attorneys for Appellant, Tyler.

(Acknowledgment of Service.)

[Endorsed]: Filed July 9, 1948. [22]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The appellant states that the points upon which he intends to rely upon appeal are the following:

1. The court erred in finding that all practices

of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff, appellant, and by the plaintiff's assignors in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretation of the following agencies of the United States, to wit: the United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administrative Agency, or any agency of the United States.

2. The court erred in finding that all the practices of the defendants, with respect to payment of overtime compensation for all hours worked by the plaintiff and by the plaintiff's assignors, in excess of forty (40) hours in any one work week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended. [23]

3. The court erred in finding that the defendants relied in good faith, or at all, upon anything except the contract which they had with the War Department of the United States (Exhibit 13).

4. The court erred in finding and concluding in Paragraph I of the conclusions of law that Sections 9 and 11 of the Portal-to-Portal Act of 1947 is constitutional.

5. The court erred in finding and concluding in Paragraph II of the conclusions of law that the

defendants are subject to no liability to the plaintiff, or to the plaintiff's assignors, for or on account of defendant's failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

6. The court erred in finding and concluding in Paragraph III of the conclusions of law that any paragraph of the findings of fact, Paragraphs 3, 5 and 7 of the conclusions of law and the judgment, heretofore entered on the 28th day of May, 1946, in favor of plaintiff and plaintiff's assignors and against the defendants should be vacated, set aside and held for naught.

7. That the court erred in entering judgment herein, dismissing the action of the plaintiff with prejudice.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,

By /s/ GEORGE J. TOULOUSE, JR.,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 9, 1948.

[24]

American Bonding Company of Baltimore
Home Office: Baltimore, Md.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents, That we, Vernon O. Tyler, as Principal, and American Bonding Company of Baltimore, as Surety, jointly and severally acknowledge ourselves to be indebted to the above-named defendants in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be levied on our goods and chattels, lands and tenements, upon the following conditions:

The condition of the obligation is such, that whereas, the above-named Defendants recovered judgment on the 2nd day of March, 1948, in the amount of

And, Whereas, said Defendants have sued out a Writ of Appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to review said judgment.

Now, Therefore, if the said plaintiff, Vernon O. Tyler, shall pay to the defendants, S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., Inc., all costs and damages that may be awarded against the Plaintiff above-named on the Appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars

(\$250.00), then this obligation to be void otherwise to [25] remain in full force and effect.

Dated this 8th day of July, 1948.

VERNON O. TYLER,
By GEORGE J. TOULOUSE, JR.,
Principal.

(Seal) AMERICAN BONDING CO.
OF BALTIMORE,

By GUERTIN CARROLL,
Attorney-in-Fact.

Bond approved July 9, 1948. Allen, Hilen, Froude, DeGarmo, per Gerald DeGarmo, Attorneys for Appellees.

[Endorsed]: Filed July 9, 1948. [26]

[Title of Court and Causes Nos. 1293-1408-1420.]

STIPULATION CONCERNING RECORD
ON APPEAL

Whereas the above-entitled actions were, pursuant to stipulation of the parties, consolidated for the purpose of trial and tried as consolidated cases before the United States District Court for the Western District of Washington, Northern Division, and by reason thereof the testimony introduced upon such trial is applicable to all three actions, and

Whereas these actions were previously appealed to the Circuit Court of Appeals for the Ninth

Circuit, bearing the numbers 11465, 11464 and 11463, respectively, and

Whereas during the pendency of said appeals the Portal-to-Portal Pay Act of 1947 was passed by the Congress of the United States, and

Whereas the United States Circuit Court of Appeals for the Ninth Circuit remanded the said cases to the United States District Court for the Western District of Washington for further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947 to these causes of action, and

Whereas the present appeals in the above-entitled cases are from the determination of the United States District Court for the Western District of Washington with reference to the applicability of the Portal-to-Portal Pay Act of 1947 to the above-entitled actions, and

Whereas on the former appeals of these cases the transcript of the testimony introduced at the trial was printed as a part of the record on appeal in the case of *S. Birch & Sons Construction Company, a Corporation, and Morrison-Knudsen Company, Inc., a Corporation, appellants, vs. Vernon O. Tyler, appellee, No. 11463*, and such transcript of testimony was not printed in the record on appeal in the other two causes set forth in the caption herein and a copy of a stipulation was [28] printed as a part of the record on appeal in the other two causes, and by such stipulation the transcript of testimony, as printed in cause number 11463 was incorporated in and by reference made

a part of the record in causes numbered 11464 and 11465;

Now, Therefore, it is hereby stipulated by and between the parties through their attorneys of record:

That the records on the present appeals of the above-entitled causes shall embrace only matters occurring subsequent to the order of the Circuit Court of Appeals for the Ninth Circuit remanding said cases to the District Court for the further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947; that for all matters occurring prior to said order the records on appeal in causes numbered 11463, 11464 and 11465 shall be and constitute the records in the present appeals; and

That the same procedure shall be followed in the present appeals as was followed in causes numbered 11463, 11464 and 11465, namely, the transcript of testimony introduced at the trial shall be printed as part of the record on appeal in Tyler, appellant, vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees, and shall not be printed as a part of the record on appeal in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and Sessing vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation; that in lieu of said transcript of testimony a copy of this stipulation shall be printed in Kohl vs. S. Birch & Sons Construction Company, a corpora-

tion, and Morrison-Knudsen Company, Inc., a corporation, and in *Sessing vs. S. Birch & Sons Construction Company*, a corporation and Morrison-Knudsen Company, Inc., a [29] corporation, and the transcript of testimony as printed in *Tyler vs. S. Birch & Sons Construction Company*, a corporation, and Morrison-Knudsen Company, Inc., a corporation, shall by this reference be adopted and incorporated as a part of the record in *Kohl vs. S. Birch & Sons Construction Company*, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and in *Sessing vs. S. Birch & Sons Construction Company*, a corporation, and Morrison-Knudsen Company, Inc., a corporation.

Dated at Seattle this 29th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Appellants
Kohl & Sessing.

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for Appellant, Tyler.
ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Appellees.

J. CHARLES DENNIS,
Attorney for United States of
America, Intervenor.

[Title of Court and Causes Nos. 1293-1408-1420.]

STIPULATION CONCERNING ORIGINAL
EXHIBITS

It Is Hereby Stipulated by and between the above-named parties, through their undersigned counsel of record, that the Clerk transmit to the Circuit Court of Appeals of the Ninth Circuit all of the original exhibits introduced in the trial of the above-entitled cause.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,

By GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiff and
Appellant, Tyler.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants and
Appellees.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Plaintiffs-
Appellants Kohl & Sessing.

J. CHARLES DENNIS,
United States Attorney.

[Title of Court and Causes Nos. 1293-1408-1420.]

ORDER CONCERNING EXHIBITS
ON APPEAL

This matter having come on duly and regularly before the undersigned judge of the above entitled court upon the Stipulation of the parties hereto through their respective counsels of record, and it appearing to the court that the Stipulation is in order, now, therefore, it is by the court

Ordered that all the original exhibits introduced and admitted in evidence in the above entitled action be transmitted as a part of the record of the above entitled action on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of a transcript of said exhibits, by the Clerk of the court.

Done in open court this 9th day of July, 1948.

JOHN C. BOWEN,
District Judge.

J. CHARLES DENNIS,
United States Attorney.

Presented by:

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE J. TOULOUSE, JR.

(Approved as to form and entry waived.)

[Endorsed]: Filed July 9, 1948.

[34]

In the District Court of the United States for the
Western District of Washington, Northern Division

[Title of Cause—Case No. 1408.]

[Title of Cause—Case No. 1420.]

[Title of Cause—Case No. 1293.]

No. 1186

H. A. LASSITER and W. R. MORRISON,
Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,
Appellees.

No. 1628

OWEN J. McNALLY, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, et al. Appellees.

No. 1456

RAYMOND N. NAYLOR, Appellant,

vs.

WEST CONSTRUCTION COMPANY,
a corporation, Appellee,

THE UNITED STATES OF AMERICA,
Intervenor.

STIPULATION

Whereas, the above-entitled actions were consolidated for the purposes of trial in the District Court and all testimony and all exhibits introduced in any one of the above-entitled cases was deemed to apply equally to all of the above-entitled cases, and

Whereas, the plaintiffs in the above-mentioned cases have taken their appeals to the Circuit Court of Appeals for the Ninth Circuit,

Now, Therefore, It Is Hereby Stipulated by and between the parties, through their attorneys of rec-

ord, that all the exhibits introduced on the trial of the above-entitled actions may be sent to the appellate court in the form in which they were introduced in lieu of copies.

Dated this 9th day of July, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for plaintiff-appellants Kohl & Sessing.

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for plaintiff-appellant Tyler.

By /s/ GEORGE J. TOULOUSE, JR.
ZABEL, POTH & PAUL,

By FREDERICK PAUL,
Attorneys for plaintiff appellants Lassiter, Morris-
son, Naylor and Owen J. McNally.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for defendant appellees S. Birch Con-
struction Company and Morrison-Knudsen Co.,
Inc.

BOGLE, BOGLE & GATES,

By ROBERT GRAHAM,
Attorneys for defendant appellee Guy F. Atkinson,
Company.

MAURICE McMICKEN,
Attorney for defendant appellee West Construc-
tion Company.

J. CHARLES DENNIS,
Attorney for United States of America Intervenor.
By FRANK PELLEGRINI,
Assistant United States Attorney.

[Endorsed]: Filed July 12, 1948.

[37]

[Title of District Court and Cause No. 1293.]

CERTIFICATE OF CLERK OF U. S. DIS-
TRICT COURT TO TRANSCRIPT OF REC-
ORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-
ington, do hereby certify that the foregoing type-
written transcript of record, consisting of pages
numbered from 1 to 37, inclusive, is a full, true
and complete copy of so much of the record, papers
and other proceedings in the above entitled cause
as is required by designation of counsel filed and
shown herein, as the same remain of record and
on file in the office of the Clerk of said District
Court at Seattle, and that the same, together with

the reporter's transcript of testimony and proceedings transmitted as a part hereof (with which testimony and proceedings there is consolidated the testimony and proceedings in our Causes No. 1186, H. A. Lassiter and W. R. Morrison vs. Guy F. Atkinson Company, No. 1408, W. L. Kohl vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1420, Arthur J. Sessing vs S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1456, Raymond N. Naylor vs. West Construction Co., and No. 1628, Owen J. McNally vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co.) constitute the record on appeal herein from the supplemental judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees for making record, certificate or return: 26 pages at 40c, \$10.40; 11 pages at 10c (copies furnished), \$1.10; Notice of Appeal, \$5.00; total \$16.50.

I hereby certify that the above amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 5th day of July, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.